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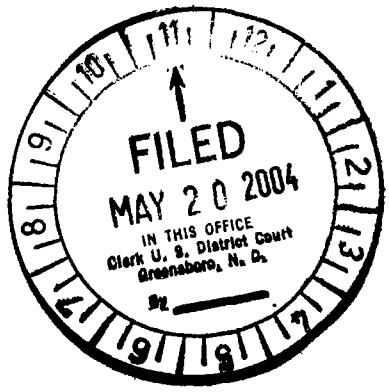
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



HOBART M. CLINE; LINDA S. CLINE; CARL SYPHRETT; CATHERINE IRBY SYPHRETT; JANIE MOSLEY-AUTERY; SALLY N. CARSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	1:03CV00590
FAIRBANKS CAPITAL CORPORATION; DAVID W. NEILL, Substitute Trustee, ELIZABETH B. ELLS, Substitute Trustee; PHILLIP A. GLASS, Substitute Trustee,	)	
Defendants.	)	

MEMORANDUM OPINION

OSTEEN, District Judge

The matter before the court is Plaintiffs Hobart M. Cline, Linda S. Cline, Carl Syphrett, Catherine Irby Syphrett, Janie Mosley-Autery, and Sally N. Carson's Motion to Remand. This putative class action was initially filed in Forsyth County Superior Court, on May 9, 2003, and Defendant Fairbanks Capital Corporation ("Fairbanks")[1] subsequently filed a Notice of Removal, on June 23, 2003, asserting federal question and diversity jurisdiction under 28 U.S.C. §§ 1331 and 1332,

[1] The other defendants in this matter are David W. Neill, Elizabeth B. Ells, and Phillip A. Glass.

respectively. PlaintiffS filed a timely Motion to Remand asserting that Fairbanks failed to file its Notice of Removal within 30 days after service of process as required by 28 U.S.C. § 1446(b).[2] For the reasons stated herein, Plaintiffs' Motion to Remand will be granted.

I. BACKGROUND

Plaintiffs filed this action in Forsyth County Superior Court alleging various state law claims including fraud, breach of contract, and unfair and deceptive trade practices, and one federal law claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. Plaintiffs contend that service of process was effectuated on Fairbanks by certified mail on May 15, 2003, and offer an affidavit of service with return receipt attached. Fairbanks admits that its employee, Wendy Daniels, signed for the certified mail, but argues that it must not have contained a summons and complaint because Fairbanks' legal department's system of recording and tracking all service of process does not indicate receipt of service on May 15. The first record Fairbanks has of service is on May 27, 2003, by way of Federal Express. Fairbanks subsequently filed its notice of removal on June 23, 2003.

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[2]It is unchallenged that the other defendants filed their notice of removal on time. However, a case is subject to remand where any one of multiple defendants has failed to submit a timely notice of removal. 28 U.S.C.A. § 1446 (a, b).

II. ANALYSIS

A lawsuit filed in state court is removable to federal court when federal subject matter jurisdiction is present. 28 U.S.C. § 1441(a). Removal is effected when a defendant files a notice of removal within 30 days after service of process. Id. § 1446(b). For purposes of fixing the 30-day starting point, sufficiency of service of process is determined according to state law. See Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 351-54, 119 S. Ct. 1322, 1327-28 (1999).

Fairbanks asserts that the 30-day period for filing notice of removal did not begin to run until May 27, 2003, the first date its records indicate service was received. If Fairbanks' position is taken as true, then its notice of removal filed on June 23 is timely. Key to Fairbanks' position is its contention that Plaintiffs' first service of process was insufficient.

In North Carolina, service of process by certified mail is presumed complete on the day that a summons and complaint are delivered to the defendant's address. N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2). When service by certified mail is challenged, Plaintiff must submit an affidavit stating that a copy of the summons and complaint was mailed and attach the return receipt evidencing that service was received. N.C. Gen. Stat. § 1-75.10(4). The presumption raised by production of such an affidavit is rebutted only upon an unequivocal showing that

proper service was not made. Grimsley v. Nelson, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996).

Plaintiffs have met Fairbanks' initial challenge by submitting an affidavit stating that a summons and complaint were mailed and attaching thereto a return receipt dated May 15, 2003, and signed by Wendy Daniels, an employee of Fairbanks. Therefore, Fairbanks can only overcome the presumption of valid service by providing unequivocal evidence of improper service. In furtherance of this goal, Fairbanks has submitted the affidavits of Wendy Daniels, Terrell W. Smith, and Lisa Crowley.

As a mailroom employee at Fairbanks, Ms. Daniels had the responsibility of picking up mail from the post office each day, including all certified mail. Ms. Daniels states in her affidavit, "I do not specifically remember signing for the certified mail package . . . however, I believe that I did, based on the information represented in the log." (Daniels Aff. ¶ 9.) Other than acknowledging her signature, she has no knowledge of the package or its contents. The affidavit provided by Terrell W. Smith, assistant general counsel and registered agent for Fairbanks, describes the legal department's standard operating procedures concerning receipt of service of process. Smith states that the service of process log indicates there is no record of service until May 27, 2003, and that all copies of the Complaint bear the stamp "Received May 27 2003 Compliance Department." Lisa Crowley, as senior counsel for Fairbanks, offers her affidavit also explaining the operating procedures of

Fairbanks' legal department and stating that Fairbanks has no other record of service occurring on a date other than May 27, 2003.

The court finds Fairbanks' affidavits insufficient to rebut the presumption of service of process. Fairbanks may only rebut the presumption of service by an unequivocal showing that service of process was not made. See Grimsley, 342 N.C. at 545, 467 S.E.2d at 94; see also Fender v. Deaton, 130 N.C. App. 657, 663, 503 S.E.2d 707, 710-11 (1998). Fairbanks' evidence is equivocal by its very nature. In essence, Fairbanks asks the court to infer that service was insufficient merely from the fact that its internal procedures, designed to record service of process, do not indicate receipt of service. This form of evidence cannot rebut the presumption of valid service.

Next, Fairbanks argues that Plaintiffs have waived their right to challenge the timeliness of removal by filing motions for entry of default and joinder of an additional plaintiff. The Fourth Circuit has not explicitly adopted waiver in this context. Although Fairbanks has cited cases from other circuits espousing such a theory, these cases are distinguishable from the present case. In Koehnen v. Herald Fire Ins. Co., the Eighth Circuit held that the plaintiff had waived objections to the timeliness of removal where he had moved the court to file a supplemental complaint and "vigorously argued" the motion before the court denied it. 89 F.3d 528, 528 (8th Cir. 1996). Significant in the court's decision was the unfairness created by allowing the

plaintiff to have a second chance at his motion for a supplemental complaint before another court. Id. Far from the facts of the Koehnen case, Plaintiffs have not argued their motions, and, in fact, have withdrawn them from consideration.

Courts that have developed a doctrine of waiver in this area apply it primarily in situations where the non-removing party has taken significant action or there is patent unfairness. See Financial Timing Publ'ns, Inc. v. Compugraphic Corp., 893 F.2d 936, 940 (8th Cir. 1990) (finding waiver where the party moving for remand represented multiple times to opposing counsel that no objection to removal would be made); Johnson v. Odeco Oil & Gas Co., 864 F.2d 40, 42 (5th Cir. 1989) (holding that amending a complaint amounted to a waiver of right to remand); Midwestern Distribution, Inc. v. Paris Motor Freight Lines, Inc., 563 F. Supp. 489, 493 (D. Ark. 1983) (providing examples of significant action including "amending the complaint . . . requesting injunctive relief, filing a motion for summary judgment, or invoking the aid of the court to engage in extensive discovery"). Fairbanks has cited no Fourth Circuit precedent for applying waiver to the present case and has failed to make a showing of sufficient affirmative activity on behalf of Plaintiffs. As such, the court finds that no waiver occurred.

Lastly, Fairbanks contends that the court has discretion to overlook procedural defects in removal. Despite Fairbanks' observation that the notice of removal is only seven days late and no prejudice appears to the parties, the court is obliged to

strictly observe the time limits for removal. The procedural nature of the time limit does not give the court license to overlook its requirements. See Booth v. Furlough, Inc., 995 F. Supp. 629, 633 (E.D. Va. 1998); FHC Options, Inc. v. Security Life Ins. Co. of Am., 993 F. Supp. 378, 380 (E.D. Va. 1998).

The cases cited by Fairbanks in which courts have exercised their discretion to overlook the procedural requirements of removal are not instructive in the present case. In FHC Options, a motion to remand was denied where the notice of removal, although filed within 30 days, did not state that it was filed within 30 days. 993 F. Supp. at 379. A similar result obtained in Wilkinson v. United States, where the court denied a motion to remand on the basis of counsel's failure to include his address in the notice of removal as required by Rule 11 of the Federal Rules of Civil Procedure. 724 F. Supp. 1200, 1204-05 (W.D.N.C. 1989). Neither FHC Options nor Wilkinson convinces the court that discretion in this case extends to overlooking an explicit time limit. As the court in FHC Options observed, "[t]here is no question that courts construe 28 U.S.C. § 1446(b) narrowly," and "failure to comply with the 30-day limit is grounds for immediately remanding a removed case to state court." 993 F. Supp. at 380. For these reasons, the court will not exercise its discretion in overlooking the 30-day time limit required for notice of removal, and, therefore, the court will remand the case to Forsyth County Superior Court.

III. CONCLUSION

For the reasons set forth above, the court will grant Plaintiffs' Motion to Remand.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 20th day of MAY 2004.

William L. Osteen
United States District Judge